MOTION FILED

JAN 2 2 1985

IN THE

Supreme Court Of The United States

OCTOBER TERM 1984

Case No. 84-998

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE VOTING RIGHTS COMMITTEE, THE NATIONAL TAX LIMITATION COMMITTEE, THE AMERICAN COUNCIL FOR HEALTH CARE REFORM, THE TAX LIMITATION FOUNDATION AND HOWARD JARVIS

AND

ACCOMPANYING AMICUS CURIAE BRIEF

ERIC J. HAUGDAHL
Attorney of record for amicus curiae
1020 E. Lafayette, Suite 208
Tallahassee, Florida 32301
Telephone: (904) 878-0215

PRESS OF BYRONS INC., CASSELBERRY, FLORIDA

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE VOTING RIGHTS COMMITTEE AND THE NATIONAL TAX LIMITATION COMMITTEE

The Motion of the Voting Rights Committee, The National Tax Limitation Committee, The American Council for Health Care Reform, The Tax Limitation Research Foundation and Howard Jarvis respectfully represents:

1. The Voting Rights Committee is a duly registered and active political action committee in the State of Florida. The Voting rights Committee seek to protect, enlarge and enhance the citizen's rights and privileges to vote upon initiatives and other issues. In furtherance of its objective, the Voting Rights Committee has proposed an Amendment through the initiative process contained in Article XI Section 3 *Fla. Const.* (1968), which it is currently circulating for the voter's approval. In addition, the Voting Rights Committee has participated as amicus curiae in the Florida State Courts in litigation seeking to remove other initiative proposal from the ballot. In such litigation the Committee supported the voters' rights to vote upon all initiatives. Thus, the Voting Rights Committee is vitally interested in the outcome of this cause and the legal principles established in this cause.

2. The National Tax Limitation Committee, is a corporation organized under the laws of California (there are no affilitates of this organization, other than the Tax Limitation Research Foundation), with over eight hundred thousand members and supporters throughout the United States, which is dedicated to various forms of tax reform. The National Tax Limitation Committee has sponsored several initiatives on tax issues, primarily in California

and Montana, and intends to use the initiative process in the future. Further, the National Tax Limitation Committee supports numerous initiatives which are now being circulated, and intends to support such initiatives in the future. The National Tax Limitation Committee requires a declaration of federal rights inherent in initiatives and referenda, and supports the positions taken herein.

3. The Tax Limitation Research Foundation is an affiliate of the National Tax Limitation Committee, and provides various research services to those interested and advocating tax reform. The Tax Limitation Research Foundation subscribes to the views expressed herein.

4. The American Council for Health Care Reform is an organization with its principal place of business in Falls Church, Virginia. The American Council for Health Care Reform plans to propose initiatives and referenda in the future. The American Council for Health Care Reform subscribes to the views contained herein and to avoid the shadow of any future referenda being found to have no federally protected rights, has joined in this brief.

5. Howard Jarvis, is an individual who has sponsored referenda, for example, the famous "Proposition 13," regarding taxation. Mr. Jarvis subscribes to the views containted herein.

6. Movants have examined the briefs filed herein by the Petitioners and Amicus Curiae Joseph Little. Movants will present to the Court an argument on two issues which have not been presented to the Court, but which are dispositive of the questions at hand; and which were decided by the Eleventh Circuit:

> 1. WHETHER AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTABLISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE

COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY, i.e. (*GRIFFIN v. BURNS* AND *DUNCAN v. POTHYRESS*).

2. DOES AN INITIATIVE PROPOSAL, OR THE INDIVIDUALS SUPPORTING INITIATIVE PROPOSALS, ENJOY THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION?

7. Movant's arguments will establish that the answer to the questions propounded above is yes, or if there is no such protection under existing law, that the Constitution mandates such protection.

8. Movants vital interests in the maintenance or ability to maintain referendum or initiative proposals raise legal issues identical to that presented in this cause. These issues are vital public issues which should be addressed by this Court:

Citizens in recent years have found that it is increasingly necessary to resort, again and again, to initiatives and referenda to protect their interests to advance causes that the public overwhelmingly favors, but which legislatures refuse to address. Absent such procedures, large segments of the voters will find their wills thwarted. And the recent spate of judicial removal from the ballot of the initiatives or referenda make the question of rights of such proposals or the persons advocating such proposals a paramount issue of great public importance.

9. The proposed brief of Movants is annexed hereto. Movants have the Petitioner's permission to file this brief. The State of Florida, Secretary of State (Respondent) through its attorney general has not granted such permission, for the sole reason that Movants were not amici below. Such reasoning is entirely devoid of compelling rationale. Movants are vitally interested in this cause, and propose to brief issues dispositive of this cause. See *On Lee*

v. United States, 434 U.S. 924 (1952) criticizing a former practice of the Solicitor General in automatically refusing to consent to the filing of amicus briefs.

ERIC J. HAUGDAHL
1020 East Lafayette Street
Suite 208
Tallahassee, Florida 32301
(904) 878-0215
Counsel of Record for Movants

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ERIC J. HAUGDAHL
Attorney of record for amicus curiae
1020 E. Lafayette, Suite 208
Tallahassee, Florida 32301
Telephone: (904) 878-0215

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AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTABLISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE ACTION AND STATE COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY. ALTERNATIVELY, THE COURT SHOULD ALTER THE EXISTING CASE LAW TO PROVIDE INITIATIVES SUCH PROTECTION

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STATEMENT OF CASE

Amicus agrees with the statement of the case made by Petitioner.

Amicus notes that the district court order dismissed the complaint for failure to state a cause of action (Appendix 72) primarily because "There is no right to vote on the amendment" (Appendix 72). The Eleventh Circuit, see *Gibson v. Firestone*, 741 F.2d 1268 at 1273 (11th Cir.,1984) footnotes eight (8) and nine (9), also held that there is no first amendment right to vote upon the initiative.

Amicus also notes that the well pled facts of the complaint and intervening complaint (Appendix 30-54) allege:

1. The gathering of 600,000 signatures to place Amendment One on the ballot, and the concomitant expenditure of over $200,000.00.

2. The receipt of a certificate of ballot position and being on the ballot.

3. The removal of the amendment from the ballot is a court proceeding which was non-adversary and collusory, and in which the Petitioners were denied party status.

4. That the decision removing the amendment from the ballot rested upon the retrospective "reccission" from the established Florida law as to the proper form of amendments. This decision applied the new criteria retrospectively, despite the drafter's reliance on the settled law.

ARGUMENT

AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTAB-

LISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE ACTION AND STATE COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY. ALTERNATIVELY, THE COURT SHOULD ALTER THE EXISTING CASE LAW TO PROVIDE INITIATIVE'S SUCH PROTECTION.

The petitioners herein have pled a violation of their rights, which if proven, would entitle them to relief in a federal forum. Petitioners have, as the Eleventh Circuit notes, found themselves in a "difficult position". Petitioners successfully placed an initiative proposal to cut taxes (Appendix 31) on the ballot, after demonstrating the support of 600,000 voters and spending in excess of $200,000.00 to gain ballot position. Yet, after these efforts, the Petitioners find themselves removed from the ballot after a court proceeding in which they were deprived of the fruits of their labor, despite the fact, that they WERE NOT parties to the proceedings and, even more nightmarishly, where the announced positions of both plaintiff and defendant in the suit was to remove the issue from the ballot!

Why then did the federal courts refuse to remedy the plight of the Petitioners? The District Court and the Eleventh Circuit both eschewed reliance upon *res adjudicata*, since as non-parties, the Petitioners were entirely unbound by the decision. It was not lack of federal authority to protect parties from collusory proceedings or being victimized by lawsuits in which their substantial interest are trampled without their being allowed an opportunity to defend themselves. In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) the federal courts nullified and held for naught and by injunction prevented a State Supreme Court decision from affecting the federal rights of non-parties to the State Court action. In *Aerojet-General*

v. Askew, 511 F.2d 710 (5th Cir. 1975) a Florida Supreme Court desision was held for naught and *a party* to the decision relieved from the effects of the decision after the Federal District Court found that the cause was collusory and non-adversary.

If the Petitioners fail in proving that the case was collusory, the retrospective invalidation of their good faith reliance upon the existing law and the appearance of the existing law[2] is sufficient to grant relief. *Briscoe v. Kusper*, 453 F.2d 1046 (7th Cir. 1970). Simply put, the rules of the game may not be changed in the seventh inning. *Duncan v. Pothyress*, 657 F.2d 691 (5th Cir. 1981). Lastly, the federal courts may revise the effects or hold for naught state court decisions which are not on adequate state grounds. This court has *twice* reversed the Alabama Supreme Court finding that Alabama could not constitutionally alter its settled procedures to deny litigants their rights *NAACP v. Alabama*, 357 U.S. 449 (1958) and *NAACP v. Alabama*, 377 U.S. 288 (1964).

The Eleventh Circuit bottoms its decision upon the "effect" of the injunction requested: the "nullification" of a state supreme court decision, and the absence of a federally protected right. Both positions are groundless. The discussion above demonstrates the availability of a limited form of relief in the case of collusory proceedings, whether or not the victimized party is privy to the litigation, or, where state officials or state courts impose novel requirements retroactively to deny vested federal rights. The only remaining question is the existence of a federal right.

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[1]It is vital to apprehend that the Florida District Court of Appeal, First District *unanimously* held the amendment to be sound, see *Fine v. Firestone*, 443 So.2d 253 (Fla. 1DCA 1983), under the existing decisions construing the rules for amendments. The Court found the amendment sound *despite* the fact that the parties to the cause both favored removing the amendment.

The Courts below, without benefit of citation, held that an amendment had no constitutional standing. The case of *Lubin v. Panish*, 415 U.S. 709 (1974) recognizes that the only means for individual citizens to protect their views is through candidates, parties or initiatives. That the right to organize into parties is protected, and the further right to organize *effectively* is also recognized; and that the right includes ballot access is beyond question. This court has further held that barring a candidate from the ballot affects his supporters right to association. *Anderson v. Celebreeze*, 103 S.Ct. 1564 (1983). The right to organize is meaningless if a state can arbitrarily bar the candidate from the ballot. See, e.g. *Williams v. Rhodes*, 393 U.S. 23 (1968). In advancing the candidacy of Amendment One, the individual proponents have formed organizations (Floridians for Tax Relief, the largest political action committee in Florida, with more than 14,000 members, is a Petitioner herein) and engaged in associational activities identical to that of political parties or candidates. In fact, Florida law requires those circulating initiatives to register as a political committee and subjects these political committees to regulation virtually identical to that of candidates. See Florida Statutes Chapter 106.

Large segments of the population, including amici herein, increasingly find themselves estranged from the state legislatures. The Voting Rights Committee, for example, has been completely unable to obtain the items on its program through the legislature. But, as Floridians for Tax Relief discovered, the Florida legislature (as many other referenda concerning taxes, whether increases or decreases have flourished recently in Ohio, California, Michigan, Minnesota and diverse other states, and some municipalities e.g. Dade County, Florida) did respond to a few of its concerns as the amendment drive began.

Amendment One now before the Court, was a result of the perception, by a substantial segment of the Florida

electorate that the legislative and executive branches of the State government were not responding to the voters' concerns that the Florida budget was growing too quickly.[2] These citizens, or many of them, resorted to the initiative method of amending the Constitution to reach their political goals when the other branches of government were not responding to their entreaties. The initiative is in many respects identical to a candidate: the public debate is similar, and the First Amendment activities are identical. In any initiative or referendum there will be associational activities and speech activities, identical to any other political campaign. In removing Amendment One,[3] the candidacy of the amendment and the philosophy of government it espoused were dealt a severe blow. The electorate's ability to effect programs which the legislature or executive do not wish to put forward is lost; here, the reforms in government tax laws sought by the Petitioners are now irrevocably lost. Thus, it is demonstrated that candidates and initiatives serve similiar purposes and implicate the same types of activities. The California Supreme Court in the famous "Proposition 13" case, *Amador Valley v. State Board*, 22 Cal.3d 208, 583 P.2d 1281 (Cal. 1978), noted that initiatives and the simple circulation of initiatives serve to "guide and goad" the legislature, and serve as a "battering ram" to spur the state government on when the public's sentiment is that the legislature is in error.

The referendum or initiative is thus a vital tool in democracy, a means for the advancement of political ideals by

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[2]The state budget had doubled from 1979 to 1984.

[3]Amendment One was removed not because of the violation of any election laws. The Florida Secretary of State, who regulates elections, had already certified (which certification was never challenged) the issue for the ballot. (Appendix 31, 49.) The issue was removed solely on the basis of its *content*. (Appendix 53.) This certainly brings into play the question of the validity of excluding items from the ballot because of their content. Such a prior restraint places an extremely heavy burden on Respondents to justify such a restraint on voting.

peaceful means, a resort to "petition to the government for a redress of grievances;" See U.S. Const. Amend 1. Such activity which is clearly within the First Amendment, should be entitled to constitutional recognition.

AN INITIATIVE PROPOSAL, AND THE INDIVIDUALS SUPPORTING IT, ENJOY THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION

Amici concede that no state is obliged to offer the citizens the privilege of amending the state constitution by initiative. But once having given the right, the State must in all of its actions comply with due process and equal protection. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). The federal courts will force state officials to comply with the unambiguous requirements of state election law, *Duncan v. Pothyress*, 657 F.2d 691 (5th Cir. 1981). Thus, it is nonsense to say that states can do willy nilly as they see fit to an initiative. The right is given, it must then be regulated by state officials in a constitutional matter.

As an alternative, the 14,000 members of Petitioner, Floridians for Tax Relief, and the various individual Petitioners have an unquestioned right to the holding of an election, if the state law so requires.[4] If Respondent is successful in preventing a vote, open season has been declared on unpopular groups or candidates. States may on totally frivolous pretexts (see the *NAACP v. Alabama* line of cases) enjoin and issue prior restraints against all those it wishes to suppress through the use of collusory suits, and the blocking of the affected parties' access to the

[4]The various briefs in the matter amply catalog the reason why the State of Florida and Respondent, Firestone are obligated to hold the election. It must be recalled that none of the petitioners were party or privy to any party who participated in the "litigation" striking the ballot question, despite their request to do so.

Courts. This is not government by laws, or due process or equal protection, it is rather oppression, and a bad dream similar to "Catch 22."

SUMMARY OF ARGUMENT

Petitioners have already amply demonstrated that their substantial procedural rights have been violated. Federal protection extends to state lawlessness invoving initiative proposals, which are a form of fundamental exercise of voting, speech and associational rights.

CONCLUSION

This question is of nation-wide importance, as initiative, referenda and other such popular means of electoral expression, are currently under an undeserved shadow of lack of constitutional protection, given the Eleventh Circuit's position in this cause. Amici and others will continue to seek their political goals throught these means, as will other large segments of the population who perceive failures in the legislative and executive branches of their state governments. The Court should grant certiorari to fully examine the pressing questions presented by this litigation.

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the Motion for leave to file amicus curiae brief and the brief were mailed, first class, with sufficent first class postage affixed thereon, on the eighteenth day of January, 1985, to each of the following (all parties who have filed appearances):

JAMES G. MAHORNER, ESQ.
1020 E. Lafayette St, Suite 207
Tallahassee, Florida 32301
Attorney of record, petitioners

JOSEPH LITTLE
3731 Northwest 13th. Place
Gainesville, Florida 32605
Attorney of record for amicus,
JOSEPH LITTLE

MITCHELL FRANKS
Attorney General's Office
The Capitol
Tallahassee, Florida 32301
Attorney for Respondent, Firestone

ERIC J. HAUGDAHL
Suite 208
1020 E. Lafayette St.
Tallahassee, Florida 32301
(904) 878-0215
Attorney of record for amici